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No. 82-1260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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Dated: June 14, 1983

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Petitioners respectfully submit that respondent's attack on the amicus brief of the United States is unsound in fact, law and policy and underscores the need for review of the intra-enterprise conspiracy doctrine by this Court.

First, respondent is unable to escape the serious conflicts among the circuits and the grave uncertainty among the bar and business community created by the intra-enterprise conspiracy doctrine. Only recently, still another lower court has emphasized that "the Circuit Courts, no doubt prompted by criticism of the doctrine by learned commentators, *see, e.g.*, P. Areeda, *Antitrust Analysis* ¶ 334 (3d ed. 1981), have developed numerous exceptions to the general rule." *In re Mid-Atlantic Toyota Antitrust Litigation*, 1983-1 Trade Cas. ¶ 65,304 (D. Md. 1983) at p. 69,792 n.12. (*See also* Pet. at 10) The resulting confusion is brought home by respondent's failure even to attempt to reconcile the test applied below with the

far different "holding out as competitors" test invoked by the Seventh Circuit in the more recent case of *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983), discussed in our Reply.[1] Respondent also attempts no answer to the views of the other amici that the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations." (Amicus Br. of National Association of Manufacturers, p. 3) The continuing flow of irreconcilable lower court decisions and the practical concerns uniformly voiced by the government and the other amici clearly justify a review of the intra-enterprise conspiracy issue by this Court.

Second, respondent's suggestion that the government has changed its position confuses statements by prior Department of Justice officials of what the law *appeared to be* with what they believed it *should be*. For example, respondent's assertion that Assistant Attorney General Turner "unequivocally" endorsed the doctrine ignores his statement immediately preceding the language quoted in respondent's brief that:

> "We certainly don't generally favor a bathtub conspiracy charge and, in fact, it is not the happiest of legal doctrines in any context." 34 ABA Antitrust L.J. 113, 122-23 (1967).

Respondent is unable to cite a single case in the last fifteen years in which the government has brought suit alleging

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[1] Similarly, a panel of the Fifth Circuit in *J. T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 795 (1983) recently held that "an important element in this capacity to conspire has been that the separate corporations be in the position of competitors." In adopting this approach, the panel failed to follow that Circuit's prior rule that separately incorporated entities are always capable of conspiring for purposes of Section 1. *See H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978).

that a parent and wholly-owned subsidiary alone provided the requisite plurality of actors for Section 1 purposes.[2] Further, respondent overlooks that the only consensus achieved in the Report of the Attorney General's Committee was that "[i]t is obviously unrealistic to expect or command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart,* or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (Report at 36)

Third, respondent is wrong that the government's arguments are at odds with sound antitrust doctrine. As the court of appeals emphasized below, academic commentators have been "almost uniformly critical" of the doctrine because of its untoward effects on business decisionmaking and antitrust counseling. The recent and exhaustive critique by Handler and Smart is typical, concluding that "[w]hen analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept." (Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo L. Rev. 23, 24 (1981)) *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act,* 95 Harv. L. Rev. 661, 681 (1982) (antitrust goals "would be best served by a [Supreme] Court ruling that related corporations are legally incapable of conspiring among themselves in violation of section 1").

Fourth, respondent misreads the law when it challenges the government's distinction between Sections 1 and 2, and the effect that distinction should have on the intra-enterprise conspiracy doctrine. As the government correctly stresses,

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[2]The recent government cases cited at page 5 of respondent's supplemental brief are not to the contrary. These cases involved conspiracies between affiliated corporations and third parties. Respondent acknowledges that a corporation and its employees cannot alone violate Section 1 of the Sherman Act but may be separately liable if they conspire with third parties; the cases cited by respondent simply apply this same principle in a parent-subsidiary context.

the doctrine is "at odds with the system of distinct standards Congress has created under the Sherman Act," because "it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form." (Br. 3, 6) The courts, in their treatment of the doctrine, have likewise stressed that "Congress has distinguished courses of conduct which are illegal when undertaken by a plurality of actors from those which are illegal when undertaken by a single entity" and that "[t]o impose section 1 liability on what in reality constitutes a single economic enterprise would imprudently blur this purposeful distinction." *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981). Precisely the same point is made by the commentators. *E.g.*, Areeda, *Antitrust Analysis* ¶ 334 at 401 (3d ed. 1981) (the doctrine "invites the inappropriate or even irrelevant application of substantive rules designed to deal with cartel or other truly conspiratorial behavior").

Fifth, respondent is incorrect in asserting that the government's legal control test would require this Court to "determine antitrust policy on the basis of paper ownership rather than economic realities." (Supp. Br. 11) The government's reliance on "ownership as the determinant of control" is firmly grounded in the economic principle that, where a subsidiary is wholly owned, there is a complete unity of legal and economic interests and the parent and subsidiary constitute a single economic enterprise. This view is consistent with corporate law and antitrust policy generally. (*See* Pet. at 21)

In sum, the United States is plainly correct in urging that a reassessment of the intra-enterprise conspiracy doctrine is now "appropriate" and that this case presents the "proper vehicle" for the Court to hold that "when common control of two corporations is itself lawful under the antitrust laws, the mere fact that those corporations coordinate their activities will not form the basis for finding concerted action in violation of Section 1 of the Sherman Act." (Br. 22-23)

Conclusion

A writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals for the Seventh Circuit.

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